(32)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 139

HARVEY GILMORE NICHOLSON,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

W. D. Bell,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 139

HARVEY GILMORE NICHOLSON,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

The petition of Harvey Gilmore Nicholson respectfully shows to this Honorable Court:

I.

Petitioner was indicted in the United States District Court at Miami, July 10, 1943, upon an indictment (R. 1-5) charging that he "*was a person liable for training and service in the land and naval forces of the United States*", (R. 2); it was further charged that he registered and was classified IV-E by Selective Service Board No. I, St. Lucie County; then an order was forwarded to him by said Local

Board directing him to report to the Local Board on February 17, 1943; and that he failed and neglected to report to said Local Board to perform work of national importance under civilian direction, in violation of the provisions of the Selective Service Act (R. 4). To this indictment petitioner filed a demurrer (R. 4-5) averring that the matters set forth in the indictment do not constitute any offense against the laws of the United States and do not come within the purview and true intent and meaning of the Selective Service Act (R. 4-5); a motion to quash averring that Petitioner is a Minister of the Gospel and that the order of the Selective Service Board is void and illegal in that it fails to follow the requirements of the Selective Service Act and that the indictment is predicated upon a void and invalid order (R. 6-9). Which demurrer and motion to quash were respectively overruled and denied (R. 6, 9-10). Thereupon Petitioner filed a plea in abatement, duly verified (R. 10-11) setting up the fact that he is a Minister of a recognized religious organization and by reason thereof is exempt from the requirements to do work of national importance, and that the order of the Selective Service Board on which the indictment is predicated is illegal and void. To this plea the Government filed a motion to strike upon the grounds that the matters and things set forth in the plea "are immaterial and irrelevant and have no place in this Court" (R. 12). Thereupon the Court entered an order striking plaintiff's Plea in Abatement (R. 12-13). Upon arraignment Petitioner stood mute and a plea of not guilty was entered for him by the Court. He was required to go to trial, and all evidence offered by him, or on his behalf, for the purpose of showing that he was not "a person liable for training and service in the land and naval forces of the United States" was excluded (R. 48, 52, 61, 63, 66, 68, 69, 75, 82, 128, 129, 130, 131, 132, 133, 134, 155, 156, 157, 158,

159, 161, 162). Petitioner was also precluded from offering before the jury any evidence to show that the Local Draft Board exceeded or usurped jurisdiction in the matter complained of. A verdict of guilty was returned against the Petitioner August 11, 1943, and judgment entered and sentence of imprisonment imposed August 21, 1943 (R. 163, 164). From this judgment and sentence Petitioner entered his appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R. 167, 168), and assigned as error the adverse rulings and orders of the District Court (R. 170-174). On April 12, 1944, the said United States Circuit Court of Appeals entered its opinion and judgment affirming the judgment of the District Court (R. 180-181). Petitioner filed his petition for rehearing in said Court May 2, 1944 and the same was denied May 15, 1944 (R. 182). Thereupon Petitioner prayed for a Stay of Mandate (R. 182-183) to enable him to apply for a Writ of Certiorari from the Supreme Court of the United States, which stay was granted May 15, 1944 (R. 183), extending time thirty days.

II.

The United States Circuit Court of Appeals of the 5th Circuit rendered a joint opinion in the case of the Petitioner and another as follows (R. 180):

> "The appellants each claimed they were ministers of religion in registering, but after due appeals were classified as conscientious objectors by their draft boards, and ordered to report for work of national importance under civilian direction. They each declined to do so, and were indicted. They sought on their trials in several ways to controvert the classification given them, and to establish their exemption from the jurisdiction of the draft boards as being in truth ministers of religion. The trial court refused to hear the evidence on the subject, holding the action of the boards

to be final in the trial of the criminal case. The questions raised are precisely dealt with and adversely determined by the Supreme Court in Nick Falbo vs. United States, * * *, decided Jan. 3, 1944. The judgment in each case is affirmed".

III.

Petitioner represents that he is advised and believes and thereupon states the fact to be that the judgment of the said Circuit Court of Appeals is erroneous in this to-wit:

(a) It holds with the Lower Court, that, although the indictment charged that the Petitioner "was a person liable for training and service in the land and naval forces of the United States" (R. 2), he should not be permitted to deny the said allegations or offer proof to show that he was in truth and fact not liable for training and service under the provisions of said Act.

(b) It holds with the Lower Court that no action of the Local Board may be questioned in any court *although such Board may usurp power or act in excess of its jurisdiction.*

(c) It holds with the Lower Court that pleas raising valid issues may be summarily stricken and the accused denied the right to be heard upon the issues raised by such pleas.

(d) It erroneously holds that all the issues raised by Petitioner's assignments of error have been foreclosed by the opinion of the Supreme Court in *Falbo* v. *U. S.*, 64 S. Ct. 346.

(e) It holds with the Lower Court that although Section 10(a) (2) of the Selective Training and Service Act provides that "Local Boards under rules and regulations prescribed by the President shall have power *within their respective jurisdiction* to hear and determine, subject to the

right of appeal to the appeal boards herein authorized, all questions or claims with regard to training and service under this Act of all individuals *within such jurisdiction* of such local boards", that the Petitioner should be precluded from showing that the said boards were not acting according to the rules and regulations prescribed by the President, and were not acting within their respective jurisdictions in determining his classification. That is to say, he was not allowed to show that the action of said boards, so far as they pertained to him, was null and void and without and beyond the jurisdiction of said boards.

(f) It holds with the Lower Court that the Petitioner should have obeyed the alleged order even though it were actually null and void, and without having any opportunity to question the same.

(g) It holds with the Lower Court that Congress may delegate to a civil board or boards the right to determine whether or not he is a minister of religion, which he avers to be in contravention to the First and Fifth Amendments to the United States Constitution.

IV.

Petitioner contends that the striking of his pleas and the exclusion of his evidence whereby he sought to show that the action of the Local Board was not within its jurisdiction and was not in accordance with the rules and regulations prescribed by the President, was a denial to him of due process of law.

The Supreme Court of the United States in the case of *Edwards* v. *U. S.*, 312 U. S. 473, 61 S. Ct. 669, says:

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But the procedure is the

skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirements that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

The Supreme Court of the United States in the case of *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 914, said:

"A sentence of a Court, produced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

"It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

The Supreme Court of the United States in the case of *Hovey* v. *Elliot*, 167 U. S. 409, 42 L. Ed. 215, 220, 221, discussing the striking of an answer from the files, and holding the same to be a denial of due process of law, said:

"The fundamental conception of a Court of Justice is condemnation only after hearing. To say that Courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the Court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." * * *

"Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute

conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possession a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and enforce justice, Courts possess the right to inflict the very wrongs which they were created to prevent."

The Supreme Court of Florida in the case of *Marks* v. *State*, 115 Fla. 497, 155 So. 727, correctly states the rule with regard to procedure in striking pleas:

> "Where a plea in abatement is defective in matters of substance, it should be attacked by the State through a demurrer to the plea while if it is untrue in fact, the issue should be joined on the plea by means of a replication. It is error for a court to summarily order and adjudge that a plea in abatement be overruled and denied where there has been no demurrer interposed thereto questioning its legal sufficiency as a matter of law, even though the plea may in law be insufficient to withstand a demurrer properly interposed."

Petitioner further contends that he is exempted by Section 5(d) of the Selective Training and Service Act; that he duly registered and fully complied with the terms of said Act, and that Congress having granted such exemption never delegated the power or jurisdiction to a Board to destroy or annul it.

The Circuit Court of Appeals, Fifth Circuit, in the case of *Lehr* v. *United States*, 139 F. 2d 919, said:

> "We take it that a person who is not within the age limits or who is a female or who is a minister or who has been deferred expressly by the Act, is not an individual *within the jurisdiction* of the local board but whether we consider it as lack of jurisdiction or lack of legal power, the legal effect would be the same and the Courts can and will prohibit the usurpation of unauthorized power."

Petitioner further contends that Congress cannot lawfully delegate the power to a Civil Board to determine whether or not he is a minister of religion, to the extent that it would be a censorship of religion by a Civil Board conferring upon such Board the right to withhold its approval and thus deny him his statutory exemption and constitutional right to the free exercise of his religion.

The Supreme Court of the United States in the case of *Cantwell* v. *State of Connecticut*, 60 S. Ct. 900, said:

> "The Connecticut State Statute prohibiting solicitation of money for religious, charitable, or philanthropic causes without approval of the secretary of the Public Welfare Council, and authorizing the secretary upon application of any person in behalf of such cause to determine whether such cause is a religious one, or a bona fide object of charity, or philanthropy, is violative of the First and Fourteenth Amendments, to the extent that it authorizes a censorship of religion by the secretary through the power conferred upon him to withhold his approval."

The Supreme Court of the United States in the case of *West Virginia* v. *State Board of Education*, 63 S. Ct. 1178, held:

> "The purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of the political

controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. U. S. C. A. Const. Amend. 1 et seq.

"One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, and they depend on the outcome of no election. U. S. C. A. Const. Amend. 1 et seq."

It follows that if a right guaranteed by the First Amendment could not be submitted to a vote of the people, it could not be submitted to the vote of a local board. It therefore follows that the statute if interpreted so as to make the decision of either a local board or an appeal board final upon a matter pertaining to the exercise of a man's religious gifts to preach, it would be null and void, and in conflict with the constitutional provisions referred to.

Petitioner further contends that he is not foreclosed upon the foregoing issues by the case of *Falbo* v. *U. S., supra*, as is erroneously assumed by the said United States Circuit Court of Appeals in the case at bar.

V.

Petitioner represents that by said decision the Circuit Court of Appeals has decided a question of Federal law in conflict with applicable decisions of the Supreme Court of the United States; and has sanctioned such a departure by the District Court from the accepted and usual course of proceedings as to call for the exercise of this Court's power of supervision.

Petitioner further represents that said decision of said Circuit Court of Appeals deprives the Petitioner of due process of law in contravention of the First and Fifth Amendments to the Constitution of the United States; that the Supreme Court of the United States has jurisdiction to

review said decision by authority of Section 347 (a), Tit
28 U. S. C. A. and Rule 38 of this Honorable Court.

VI.

A certified copy of the entire record of said case in sai
United States Circuit Court of Appeals, Fifth Circuit,
hereby furnished, attached to and made a part of this a
plication, marked Exhibit A.

VII.

WHEREFORE, your Petitioner respectfully prays that
Writ of Certiorari may be issued out of and under the se
of this Court directed to the United States Circuit Court
Appeals, Fifth Circuit, commanding the said Court
certify and send to this Court, on a day certain to be there
designated, a full and complete transcript of the record an
all proceedings of the Circuit Court of Appeals, Fifth Ci
cuit, in the said case entitled Harvey Gilmore Nicholso
Appellant, *vs.* United States of America, Appellee, to th
end that said case can be reviewed and determined by th
Court as provided by the rule of this Court and by the sta
ute in such case made and provided, or that your Petitione
may have such other and further relief or remedy in th
premises as this Court may deem appropriate and in co
formity with the said rules of this Court and the said sta
utes, and that the said judgment of the United States Ci
cuit Court of Appeals, Fifth Circuit, in the said case, an
every part theerof, may be reversed by this Honorab
Court.

HARVEY GILMORE NICHOLSON,
Petitioner.

(23)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 140

ALBERT CLANTON LOWERY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

W. D. Bell,
Counsel for Petitioner.

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ALBERT CLANTON LOWERY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Supreme Court of the United States:

The petition for Albert Clanton Lowery respectfully shows to this Honorable Court:

I.

Petitioner was indicted in the United States District Court at Miami, July 10, 1943, upon an indictment (R. 1-5) charging that he "*was a person liable for training and service in the land and Naval forces of the United States*", (R. 2); it was further charged that he registered and was classified 1-A-O by Selective Service Board No. 5, Dade County, that he appealed this classification and was placed in 4-E

by the Appeal Board; then an order was forwarded to him by said Local Board "*under the direction of General Hershey and State Director of Selective Service*" directing him to report to the Local Board on April 19, 1943; that although he appeared before the Local Board at the time ordered, he refused to discharge his obligation under the Act to perform work of National importance under civilian direction, in violation of the provisions of the Selective Service Act (R. 5). To this indictment Petitioner filed a demurrer (R. 5-6) averring that the matters set forth in the indictment do not constitute any offense against the laws of the United States and do not come within the purview and true intent and meaning of the Selective Service Act (R. 6); a motion to quash averring that Petitioner is a Minister of the Gospel and that the order of the Selective Service Board is void and illegal in that it fails to follow the requirements of the Selective Service Act and that the indictment is predicated upon a void and invalid order (R. 8-9). Which demurrer and motion to quash were respectively overruled and denied (R. 7, 10-11). Thereupon Petitioner filed a plea in abatement, duly verified (R. 11-12) setting up the fact that he is a Minister of a recognized religious organization and by reason thereof is exempt from the requirements to do work of National importance, and that the order of the Selective Service Board on which the indictment is predicated is illegal and void. To this plea the Government filed a motion to strike upon the grounds that the matters and things set forth in the plea "are immaterial and irrelevant and have no place in this Court" (R. 13). Thereupon the Court entered an order striking plaintiff's Plea in Abatement No. 1 (R. 13-14). Upon arraignment Petitioner stood mute and a plea of not guilty was entered for him by the Court. He was required to go to trial, and all evidence offered by him, or on his behalf, for the purpose of showing that he was not

"a person liable for training and service in the land and Naval forces of the United States" was excluded (R. 87, 90, 92, 95, 101, 119, 190, 191, 192, 194, 195, 197, 198, 205, 208). Petitioner was also precluded from offering before the jury any evidence to show that the Local Draft Board exceeded or usurped jurisdiction in the matter complained of. A verdict of guilty was returned against Petitioner August 10, 1943, and judgment entered and sentence of imprisonment imposed August 12, 1943 (R. 209). From this judgment and sentence Petitioner entered his appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R. 212, 213), and assigned as error the adverse rulings and orders of the District Court (R. 217-223). On April 12, 1944, the said United States Circuit Court of Appeals entered its opinion and judgment affirming the judgment of the District Court (R. 225-226). Petitioner filed his petition for rehearing in said Court May 2, 1944 and the same was denied May 15, 1944 (R. 226).

Thereupon Petitioner prayed for a Stay of Mandate (R. 227) to enable him to apply for a Writ of Certiorari from the Supreme Court of the United States, which stay was granted May 15, 1944 (R. 228) extending time thirty days.

II.

The United States Circuit Court of Appeals of the 5th Circuit rendered a joint opinion in the case of the Petitioner and another as follows (R. 225):

> "The appellants each claimed they were ministers of religion in registering, but after due appeals were classified as conscientious objectors by their draft boards, and ordered to report for work of national importance under civilian direction. They each declined to do so, and were indicted. They sought on their trials in several ways to controvert the classification given them, and to establish their exemption from the

jurisdiction of the draft boards as being in truth ministers of religion. The trial court refused to hear the evidence on the subject, holding the action of the boards to be final in the trial of the criminal case. The questions raised are precisely dealt*h* with and adversely determined by the Supreme Court in Nick Falbo vs. United States, * * *, decided Jan. 3, 1944. The judgment in each case is affirmed."

III.

Petitioner represents that he is advised and believes and thereupon states the fact to be that the judgment of the said Circuit Court of Appeals is erroneous in this to-wit:

(a) It holds with the Lower Court, that, although the indictment charged that the Petitioner "was a person liable for training and service in the land and Naval forces of the United States" (R. 2), he should not be permitted to deny the said allegations or offer proof to show that he was in truth and fact not liable for training and service under the provisions of said Act.

(b) It holds with the Lower Court that no action of the Local Board may be questioned in any court *although such Board may usurp power or act in excess of its jurisdiction.*

(c) It holds with the Lower Court that pleas raising valid issues may be summarily stricken and the accused denied the right to be heard upon the issues raised by such pleas.

(d) It erroneously holds that all the issues raised by Petitioner's assignments of error have been foreclosed by the opinion of the Supreme Court in *Falbo* v. *U. S.* 64 S. Ct. 346.

(e) It holds with the Lower Court that although Section 10(a)(2) of the Selective Training and Service Act provides that "Local Boards under rules and regulations pre-

ibed by the President shall have power *within their re-ective jurisdiction* to hear and determine, subject to the ht of appeal to the appeal boards herein authorized, all estions or claims with regard to training and service der this Act of all individuals *within such jurisdiction* such local boards", that the Petitioner should be pre-ded from showing that the said boards were not acting cording to the rules and regulations prescribed by the esident, and were not acting within their respective juris-tions in determining his classification. That is to say, was not allowed to show that the action of said boards, far as they pertained to him, was null and void and thout and beyond the jurisdiction of said boards.

(f) It holds with the Lower Court that the Petitioner ould have obeyed the alleged order even though it were tually null and void, and without having any opportunity question the same.

(g) It holds with the Lower Court that Congress may legate to a civil board or boards the right to determine hether or not he is a minister of religion, which he avers be in contravention to the First and Fifth Amendments the United States Constitution.

IV.

Petitioner contends that the striking of his pleas and the xclusiion of his evidence whereby he sought to show that he action of the Local Board was not within its jurisdiction nd was not in accordance with the rules and regulations rescribed by the President, was a denial to him of due rocess of law.

The Supreme Court of the United States in the case of *Edwards* v. *U. S.*, 312 U. S. 473, 61 S. Ct. 669, says:

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed.

> Procedural errors often are. But the procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirements that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

The Supreme Court of the United States in the case of *Windsor* v. *McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 914, said:

> "A sentence of a Court, produced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."
>
> "It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

The Supreme Court of the United States in the case of *Hovey* v. *Elliot*, 167 U. S. 409, 42 L. Ed. 215, 220, 221, discussing the striking of an answer from the files, and holding the same to be a denial of due process of law, said:

> "The fundamental conception of a Court of Justice is condemnation only after hearing. To say that Courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the Court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." * * *
>
> "Can it be doubted that due process of law signifies a right to be heard in ones defense? If the legislative

> department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and enforce justice, Courts possess the right to inflict the very wrongs which they were created to prevent."

The Supreme Court of Florida in the case of *Marks* v. *State*, 115 Fla. 497, 155 So. 727, correctly states the rule with regard to procedure in striking pleas:

> "Where a plea in abatement is defective in matters of substance, it should be attacked by the State through a demurrer to the plea while if it is untrue in fact, the issue should be joined on the plea by means of a replication. It is error for a court to summarily order and adjudge that a plea in abatement be overruled and denied where there has been no demurrer interposed thereto questioning its legal sufficiency as a matter of law, even though the plea may in law be insufficient to withstand a demurrer properly interposed."

Petitioner further contends that he is exempted by Section 5 (d) of the Selective Training and Service Act; that he duly registered and fully complied with the terms of said Act, and that Congress having granted such exemption never delegated the power or jurisdiction to a Board to destroy or annul it.

The Circuit Court of Appeals, Fifth Circuit, in the case of *Lehr* v. *United States,* 139 F. 2d 919, said:

> "We take it that a person who is not within the age limits or who is a female or who is a minister or who has been deferred expressly by the Act, is not an individual *within the jurisdiction* of the local Board but whether we consider it as lack of jurisdiction or lack of legal power, the legal effect would be the same and the Courts can and will prohibit the usurpation of unauthorized power."

Petitioner further contends that Congress cannot lawfully delegate the power to a Civil Board to determine whether or not he is a minister of religion, to the extent that it would be a censorship of religion by a Civil Board conferring upon such Board the right to withhold its approval and thus deny him his statutory exemption and constitutional right to the free exercise of his religion.

The Supreme Court of the United States in the case of *Cantwell* v. *State of Connecticut,* 60 S. Ct. 900, said:

> "The Connecticut State Statute prohibiting solicitation of money for religious, charitable, or philanthropic causes without approval of the secretary of the Public Welfare Counsel, and authorizing the secretary upon application of any person in behalf of such cause to determine whether such cause is a religious one, or a bona fide object of charity, or philanthropy, is violative of the First and Fourteenth Amendments, to the extent that it authorizes a censorship of religion by the secretary through the power conferred upon him to withhold his approval."

The Supreme Court of the United States in the case of *West Virginia* v. *State Board of Education,* 63 S. Ct. 1178, held:

> "The purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of the political

controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. U. S. C. A. Const. Amend. 1 et seq.

"One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote, and they depend on the outcome of no election. U. S. C. A. Const. Amend. 1 et seq."

It follows that if a right guaranteed by the First Amendment could not be submitted to a vote of the people, it could not be submitted to the vote of a local board. It therefore follows that the statute if interpreted so as to make the decision of either a local board or an appeal board final upon a matter pertaining to the exercise of a man's religious gifts to preach, it would be null and void, and in conflict with the constitutional provisions referred to.

Petitioner further contends that he is not foreclosed upon the foregoing issues by the case of *Falbo* v. *U. S., supra*, as is erroneously assumed by the said United States Circuit Court of Appeals in the case at bar.

V.

Petitioner represents that by said decision the Circuit Court of Appeals has decided a question of Federal law in conflict with applicable decisions of the Supreme Court of the United States; and has sanctioned such a departure by the District Court from the accepted and usual course of proceedings as to call for the exercise of this Court's power of supervision.

Petitioner further represents that asid decision of said Circuit Court of Appeals deprives the Petitioner of due process of law in contavention of the First and Fifth Amendments to the Constitution of the United States; that the Supreme Court of the United Sates has jurisdiction to

review said decision by authority of Section 347 (a), Title 28 U. S. C. A. and Rule 38 of this Honorable Court.

VI.

A certified copy of the entire record of said case in said United States Circuit Court of Appeals, Fifth Circuit, is hereby furnished, attached to and made a part of this application, marked Exhibit A.

VII.

Wherefore your Petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals, Fifth Circuit, in the said case entitled Albert Clanton Lowery, Appellant vs. United States of America, Appellee, to the end that said case can be reviewed and determined by this Court as provided by the rule of this Court and by the statute in such case made and provided, or that your Petitioner may have such other and further relief or remedy in the premises as this Court may deem appropriate and in conformity with the said rules of this Court and the said statutes, and that the said judgment of the United States Circuit Court of Appeals, Fifth Circuit, in the said case, and every part thereof, may be reversed by this Honorable Court.

ALBERT CLANTON LOWERY,
Petitioner.

Nos. 139 and 140

In the Supreme Court of the United States

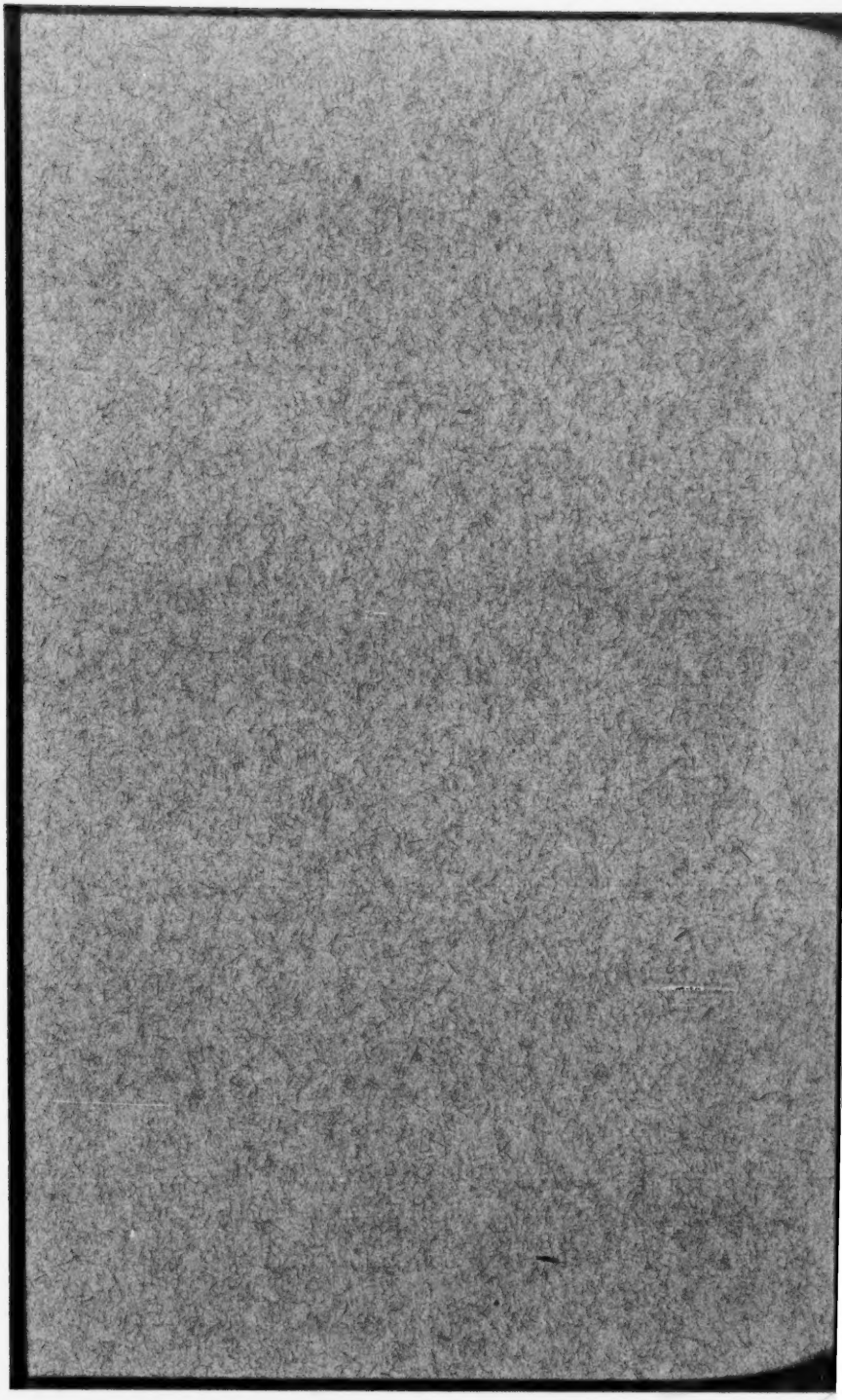
October Term, 1944

HARRY GOUNARIS MACKLIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 139

HARVEY GILMORE NICHOLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 140

ALBERT CLANTON LOWERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On July 10, 1943, petitioners were separately indicted in the United States District Court for the Southern District of Florida for violation of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. 301 et seq.). Nicholson was charged with having wilfully failed and

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neglected to report to his local board for work of national importance under civilian direction as required by the order of his local board (No. 139, R. 1–4). Lowery was charged with having failed to comply fully with the order of his local board to report for work of national importance in that, although he reported to the local board, he refused to perform work of national importance (No. 140, R. 1–5).[1]

At petitioners' separate jury trials the Government proved that they had registered with their local boards and filed the regular questionnaires (No. 139, R. 24–26, 85–106; No. 140, R. 32–33, 34, 97, 140–164) and also conscientious objector forms (No. 139, R. 28–29, 110–119; No. 140, R. 33–34, 104, 122, 164–175); that they were classified I–A–O (available for noncombatant military service) by their local boards and upon appeal to the appeal boards were classified IV–E (conscientious objectors to both combatant and noncombatant military service) (No. 139, R. 27, 36–37,

[1] This charge is based on evidence which discloses that although Lowery reported to the local board and was furnished transportation to a conscientious objector camp, he refused to proceed to the camp assigned (No. 140, R. 42–43, 53–54, 123, 128). It is clear from the order to report set forth in the indictment (R. 4) and Selective Service Regulation 652.11 that Lowery's duty under the Act and Regulations did not end with his mere reporting to the local board; that he also had a duty to report to the camp to which he had been assigned by the Director of Selective Service and to perform work of national importance under civilian direction at that camp.

109, 123; No. 140, R. 35–36, 46, 47, 72, 104–106, 120); that each was notified of his classification and thereafter ordered to report for work of national importance (No. 139, R. 27–30, 120–122; No. 140, R. 39–40, 181–185, 208); and that petitioners each received these notices and orders (No. 139, R. 70–71; No. 140, R. 42–43, 107, 120, 206), but wilfully failed and refused to comply with the orders (No. 139, R. 30, 40, 58, 124; No. 140, R. 40, 42–43, 76–77, 107–108, 121, 123, 127–128, 206–207).

The trial court excluded evidence offered by petitioners to show that they were ministers of religion and therefore entitled to exemption from training and service under the Act (No. 139, R. 48, 52–61, 63, 66, 68, 69, 74–75, 82, 128–134, 155–159, 161–162; No. 140, R. 31, 78–97, 101, 109–119, 126–127, 190–192, 194, 197–205, 208).[2] The court also specifically instructed the jury in each case that it was not their function to pass upon the correctness of the draft board's classification of petitioner, but merely to determine whether petitioner had received the board's order to report and had refused to obey the order (No. 139, R. 78–80; No. 140, R. 134–136).

Petitioners were each convicted and sentenced to imprisonment for three years (No. 139, R. 13,

[2] Prior to the trial petitioners unsuccessfully attacked the indictments by demurrers, motions to quash and pleas in abatement based primarily on the ground that they were unlawfully denied exemption as ministers, and that the local boards' orders to report were therefore void (No. 139, R. 4–13; No. 140, R. 5–6, 8–17; see also R. 108, 121, 206–207).

163–164; No. 140, R. 18, 208–209). Upon appeals, which were disposed of in a single opinion, the convictions were affirmed *per curiam* by the Circuit Court of Appeals for the Fifth Circuit (No. 139, R. 180–181; No. 140, R. 225–226).

Here, as in *Falbo* v. *United States,* 320 U. S. 549,[3] petitioners sought to defend their refusal to report for service on the ground that the orders to report were void in that they were based upon an erroneous classification. The decision of this Court in the *Falbo* case, rejecting such a contention as incompatible with the structure, history, and purposes of the Selective Training and Service Act of 1940, makes it unnecessary to reargue the question here. Petitioners' characterization of the local board's actions as "arbitrary and capricious" does not raise any additional constitutional questions. Petitioners complain only of the boards' refusal, upon the facts presented to them, to classify petitioners as ministers entitled to exemption under the Act.

Since the exemption from military service is a matter of legislative discretion rather than constitutional mandate (*United States* v. *Macintosh,* 283 U. S. 605, 622; *Hamilton* v. *Regents,* 293 U. S.

[3] The Selective Service Regulations in effect at the time of petitioners' offenses were identical with those applicable in the *Falbo* case. Here, as in that case, the administrative process of selection had not been completed at the time of the offenses in question (see p. 553 of the *Falbo* decision).

245, 263–264; *Rase* v. *United States*, 129 F. (2d) 204, 210 (C. C. A. 6)), petitioners' contention (No. 139, Pet. 8–9; No. 140, Pet. 8–9) that the First Amendment forbids delegation of the fact-finding function to the Selective Service boards with reference to a registrant's ministerial status plainly is without merit.

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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